IN THE

Supreme Court of the United States

October Term, 1979

No. 79-512

SCINDIA STEAM NAVIGATION CO., LTD.,
Petitioner,

v.

LAURO DE LOS SANTOS AND SEATTLE STEVEDORE CO.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(3)

TABLE OF CONTENTS

	Page
Questions Presented	1
Statement of the Case	2
Assumption of the Risk—Comparative Negligence—Concurrent Negligence	3
Considerations In Granting the Writ	9

TABLES OF AUTHORITY

Table of Cases

Anderson v. Iceland Steamship Co., 585 F.2d 1142 (1st Cir. 1978)	9
Anuszewski v. Dynamic Mariners Corp., 540 F.2d 757, 1976 Am. Mar. Cas. 2048 (4th Cir. 1976)	9
Canizzo v. Farrell Lines, Inc., 579 F.2d 682, 1978 Am. Mar. Cas. 1920 (2d Cir. 1978)	7
Chavis v. Finnlines Ltd., 576 F.2d 1072 (4th Cir. 1978)	9
Clemons v. Mitsui O.S.K. Lines, Ltd., and Baba-Daiko Shosen, K.K., 596 F.2d 746 (7th Cir. 1979)	8
Dodge v. Mitsui Shintaku Ginko K.K. Tokyo, 528 F.2d 669 (9th Cir. 1975), *cert. denied*, 425 U.S. 944, 48 L. Ed. 2d 188, 96 S. Ct. 1685 (1976)	5
Edmonds v. Compagnie Generale, ... U.S. ....., 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979)	5
Gay v. Ocean Transport & Trading Ltd., 546 F.2d 1233 (5th Cir. 1977)	8
Griffin v. Wheeling-Pittsburgh Steel Corp., ... F.2d ..... (3d Cir. 1979)	7
Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406 (1959)	7, 9, 10
Matthews v. Ernst Russ Steamship Co. and M/V Tilly Russ, etc., ... F.2d ..... (7th Cir. 1979)	8

Page

Napoli v. Hellenic Lines, Ltd., 536 F.2d 505, 1976 Am. Mar. Cas. 551 (2d Cir. 1976) 7

Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962).. 3

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 98 L. Ed. 143, 74 S. Ct. 202 (1953) 4

Shellman v. U.S. Lines, Inc., 528 F.2d 675 (9th Cir. 1975), *cert. denied*, 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1668 (1976) 5

Socony-Vacuum Oil Company v. Smith, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262 (1939) 4

The Max Morris, 137 U.S. 1, 34 L. Ed. 586, 11 S. Ct. 29 (1890) 4

Wiles v. Delta Steamship Lines, Inc., 574 F.2d 1338, 1978 Am. Mar. Cas. 2427 (5th Cir. 1978) 8

Other Authority

Fed. R. Civ. P. 56 1

H. Rep. No. 92-1441, 92d Cong., 2d Sess., *3 U.S. Code Cong. and Ad. News* (1972) 4-5, 6

Restatement (Second) of Torts, §§ 343, 343A 4, 8, 9, 10

S. Rep. No. 92-1125, 92d Cong., 2d Sess., *3 U.S. Code Cong. and Ad. News* (1972) 5, 6

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QUESTIONS PRESENTED

1. Was the court of appeals correct in holding that there were material questions of fact, or inferences to be drawn from the underlying facts, which could not be decided on motion for summary judgment under Fed. R. Civ. P. 56?

2. Was the court of appeals correct in deciding that the 1972 amendments to the Longshoremen's and Harbor-workers' Compensation Act did not substitute assumption of risk and contributory negligence principles for the Admiralty concept of comparative negligence?

3. Was the court of appeals correct in deciding that the contributory negligence of a longshoreman's employer or fellow employee will not preclude or diminish recovery through some theory of imputed contributory negligence?

This is not a case of imposing on a shipowner the duty of countermanding a stevedore's work methods as argued by petitioner. This is a case of a shipowner's negligent failure to maintain its own ship's winch in proper working condition even though it had ample opportunity to discover and remedy the malfunction of the winch.

STATEMENT OF THE CASE

This is a personal injury action brought by Lauro De Los Santos, a longshoreman. The complaint alleged that Santos was injured on December 10, 1972, as a proximate result of the negligence of the shipowner in providing the longshoremen with a faulty and malfunctioning winch, in failing to have the faulty and malfunctioning winch repaired prior to the time of the accident, and in failing to provide Santos with a safe place to work aboard the vessel M/V JALARATNA. The district court granted the shipowner's motion for summary judgment. The court inappropriately engaged in "fact-finding" on reasonably disputable factual issues. The court of appeals reversed because those issues were material and could not be decided on motion for summary judgment (Appendix Petitioner's Brief, Par. IV, pp. B-18 - B-23).

Essential to the district court's decision were a number of "findings of fact" which resolved material questions of fact in favor of the shipowner when the evidence would have supported findings by a jury that were contrary to the district court's "findings." Thus, a jury could have found that the shipowner, in fact, knew that the winch was defective. There is uncontradicted evidence that the winch had been malfunctioning for two days prior to the date of the accident, and that during that time the repre-

sentatives of the shipowner were back and forth in the vicinity of the loading operations.

The district court "found" that the stevedore had exclusive control during the relevant time period, but there was a serious dispute as to exactly what control was within the power of the stevedore and what remained in the shipowner. The defective winch belonged to the shipowner as an integral part of the ship itself. Neither the plaintiff, Santos, nor any other longshoreman, had authority to take it upon themselves to repair the winch.

These examples, in addition to the others discussed in the decision of the court of appeals (Appendix Petitioner's Brief, Par. IV, pp. B-18 - B-23) are intimately connected with, and essential to, any decision that, as a matter of law, the defendant cannot be held responsible for the accident. It was not within the province of the district court to resolve those questions in the first instance. *Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962).

ASSUMPTION OF THE RISK-COMPARATIVE NEGLIGENCE-CONCURRENT NEGLIGENCE

The essence of the district court's decision was that the injured longshoreman, Santos, could not recover against the shipowner, as a matter of law, because the danger was "open and obvious" to the plaintiff and the plaintiff recognized "that the circumstances were so dangerous." (Appendix A, Petitioner's Brief). The practical effect of the decision was to bar recovery because of assumption of risk. Thus, the district court committed clear error.

It is respectfully submitted that the decision of the court of appeals was absolutely correct in its adoption of a

standard of negligence which did not inject assumption of risk or contributory negligence bars against the plaintiff. Obviously, this is not new or different law. The appellate court was most troubled by the district court's application of *Restatement (Second) of Torts,* §343 and §343A to the extent that they incorporate assumption of risk and contributory negligence ingredients which are inconsistent both with the maritime law as it traditionally has existed and with the 1972 amendments to the Longshoremen's and Harborworkers' Compensation Act. The appellate court reversed the district court because its application of *Restatement (Second) of Torts,* §343 and §343A incorporated the substance of the defenses of contributory negligence and assumption of the risk. The appellate court was correct, it is respectfully submitted, for the following reasons:

(1) Any negligence of plaintiff is not an absolute bar to recovery under maritime law which accepts the concept of comparative negligence of plaintiff and defendant. *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 408-409, 98 L. Ed. 143, 74 S. Ct. 202 (1953); *Socony-Vacuum Oil Company v. Smith,* 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262 (1939); *The Max Morris,* 137 U.S. 1, 34 L. Ed. 586, 11 S. Ct. 29 (1890).

(2) Congress specifically intended and stated that the admiralty concepts of comparative negligence rather than the common law rule as to contributory negligence should apply and also specifically provided that the preclusion of the defense of assumption of the risk would continue after the amendments. House Report No. 92-1441, 92d Cong., 2d Sess.,

reprinted in, 3 *U.S. Code Congressional and Administrative News,* (1972) p. 4704; Senate Report No. 92-1125, 92d Cong., 2d Sess., p. 12:

> Finally, the Committee does not intend that the negligence remedy authorized in the bill shall be applied differently at different ports depending on the law of the state in which the port may be located. The Committee intends the legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of federal law. In that connection, *the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply* in cases where the injured employee's own negligence may have contributed to causing the injury. *Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.*

(Emphasis added.)

(3) A longshoreman's personal carelessness reduces but does not necessarily bar his recovery. The negligence of a fellow workman or the stevedore contractor cannot bar a longshoreman's recovery against a shipowner in a concurrent negligence situation. The negligence of the longshoreman's employer or fellow longshoremen will not preclude or diminish recovery through a theory of imputed contributory negligence. *Shellman v. U.S. Lines, Inc.,* 528 F.2d 675 (9th Cir. 1975), *cert. denied,* 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1668 (1976), *Dodge v. Mitsui Shintaku Ginko K.K. Tokyo,* 528 F.2d 669 (9th Cir. 1975), *cert. denied,* 425 U.S. 944, 48 L. Ed. 2d 188, 96 S. Ct. 1685 (1976); *Edmonds v. Compagnie Generale,* .... U.S. ...., 61 L. Ed. 2d 521, 99 S. Ct. 2753 (1979).

(4) The oil spill example set out in the Congressional Committee reports (House Report at 4705; Senate Report at 10-11; 3 *U.S. Code Congressional and Administrative News,* (1972) p. 4705), makes it clear that the failure of the shipowner to discover and remove oil from a ship's deck resulting in injury to a longshoreman who slips and falls, can constitute negligence if "the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances."

The example is quoted below:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a landbased person in providing a safe place to work. *Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.*
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: (1) The vessel put the foreign substance on the deck or knew that it was there, and willfully or negligently failed to remove it, *or (2) The foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.*

(Emphasis added.)

Thus, petitioner can hardly argue that "reasonable care by the vessel under the circumstances" is not a proper standard.

(5) This court's decision in *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 3 L. Ed. 2d 550, 79 S. Ct. 406 (1959), rejected the status designations of invitee, licensee and trespasser and held that a vessel owner owes the duty of ordinary care to all persons lawfully aboard the vessel. The shipowner must exercise reasonable care under the circumstances of each case.

Petitioner states that the decision of the Ninth Circuit is inconsistent with decisions in the Second, Third, Fourth, Fifth and Seventh Circuits. It is submitted, that the decision of the Ninth Circuit is solidly based and well-reasoned and represents a clear statement of a rule many courts are developing. The case by case sifting of decisions through the lower courts has already eliminated some of the so-called conflicts referred to in the brief of petitioner. Thus, in the Second Circuit, the court in *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 1978 Am. Mar. Cas. 1920 (2d Cir. 1978), upheld a trial court's award in favor of the injured longshoreman even though the condition of the deck was "obviously dangerous."

In *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 1976 Am. Mar. Cas. 551 (2d Cir. 1976), the court cautioned concerning the application of contributory negligence and assumption of the risk and went on to reverse and remand for a new trial on the basis that the ship could reasonbly have anticipated that the injured longshoreman would not have been able to avoid the danger despite its obviousness.

In the Third Circuit, *Griffin v. Wheeling-Pittsburgh Steel Corp.* ..... F.2d ..... (3d Cir. decided August 24, 1979) followed the *Kermarec* case, *above*, and adopted a standard of

reasonable care under the circumstances. The court rejected assumption of risk and imputation of negligence as improper ingredients in a longshoreman's personal injury case.

The case of *Matthews v. Ernst Russ Steamship Co., and M/V Tilly Russ, etc.,* .... F.2d .... (7th Cir. decided August 20, 1979), held that control of the unloading operation by the stevedore company did not absolve the ship from negligence in furnishing an unsafe ladder, and the fact that the danger was open and obvious did not prevent the plaintiff from recovery as a matter of law. Thus, the Seventh Circuit has turned toward a reasonable care under the circumstances approach in favor of its earlier approach in *Clemons v. Mitsui O.S.K. Lines, Ltd., and Baba-Daiko Shosen, K.K.,* 596 F.2d 746 (7th Cir. 1979), wherein it barred recovery, as a matter of law, because it held the longshoreman to have assumed the risk and imputed the negligence of the employer to him.

In the Fifth Circuit, the acceptance of §343 and §343A of the Restatement are much tempered by the court's more recent statements. In *Gay v. Ocean Transport & Trading Ltd.,* 546 F.2d 1233 (5th Cir. 1977), the court cautioned that it would not allow assumption of risk defenses to enter into longshore personal injury cases under the guise of "open and obvious danger" obviating any duty on the part of the shipowner. This trend was followed in that circuit in *Wiles v. Delta Steamship Lines, Inc.,* 574 F.2d 1338, 1978 Am. Mar. Cas. 2427 (5th Cir. 1978), wherein the court reversed and remanded for consideration of the question of whether the shipowner had been negligent and, if so, whether the plaintiff himself was negligent in a comparative negligence sense. It is submitted that the trend

in the Fifth Circuit shows a turning away from assumption of risk principles and toward a reasonable care under the circumstances approach.

In the First Circuit, in the case of *Anderson v. Iceland Steamship Co.*, 585 F.2d 1142 (1st Cir. 1978), the court specifically refuses to adopt Restatement §343 and §343A because of their incorporation of the defenses of contributory negligence and assumption of the risk.

In the Fourth Circuit case of *Chavis v. Finnlines Ltd.*, 576 F.2d 1072 (4th Cir. 1978), the court approved a jury instruction which stated that the owner of the ship owed the longshoreman the duty to exercise ordinary care under the circumstances and must keep the premises reasonably safe for use by the longshoreman in every reasonable pursuit in the performance of his duties. The earlier *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757, 1976 Am. Mar. Cas. 2048 (4th Cir. 1976), held that plaintiff was barred from recovery by accepting an open, obvious, and known danger.

CONSIDERATIONS IN GRANTING THE WRIT

It could be argued that the apparent early conflicts caused by the adoption of §343 and §343A of the *Restatement (Second) of Torts* are being resolved by the courts on a case by case basis. It could be argued more persuasively that the Restatement sections are so inconsistent with this Court's decision in *Kermarec, supra,* with the admiralty rule rejecting contributory negligence and assumption of risk, and with the clear congressional mandate regarding the 1972 amendments, that the attempts to reconcile will

ultimately create more confusion. Without a clear statement from this honorable court, the result may well be the very process which this court rejected in *Kermarec,* at 3 L. Ed. 2d at 554:

> In an effort to do justice in an industrialized modern society, with its complex economic and individual relationships, modern common law courts have found it necessary to formulate increasingly subtle verbal refinements to create some classifications among traditional common law categories, and to delineate fine gradations in the standards of care which the land owner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured. Through this semantic morass the common law has moved, unevenly and with hesitation, towards "imposing on owners and occupiers a single duty of reasonable care in all of the circumstances."

As pointed out above, the "increasingly subtle refinements" have already begun in the Second, Fourth, Fifth and Seventh Circuits. The subclassifications and exceptions are a denial of the basic incompatibility of the admiralty law with Restatement 343 and 343A to the extent that assumption of risk and contributory negligence permeate them. The Ninth Circuit pointed out that the *Kermarec* reasoning applies "just as fully today." Perhaps, a simple reaffirmation of the *Kermarec* rule, as followed in this case, would be in order.

Respectfully submitted,

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